No. 20783

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING & CONSTRUCTION TRADES COUNCIL,
Respondent.

BRIEF OF INTERVENOR AND AMICUS CURIAE

On Petition for Enforcement of an Order of the National Labor Relations Board

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Brief of Intervenor and Amicus Curiae

STATEMENT

This brief is submitted pursuant to permission of ıe Court given on April 20, 1966. General contractor Willis Hill was represented by the intervenor, Willam-te General Contractors Association, when the charge as filed. Thereafter, he delegated his bargaining rights t Associated General Contractors of America, Inc., regon-Columbia Chapter, *amicus curiae.*

QUESTION PRESENTED FOR DECISION

Respondent picketed the job site of general contrac-r Willis Hill to enforce a demand that Hill execute its andard form of collective bargaining agreement. Ar-cle IX of the proposed agreement provided:

> "It is further agreed that no employee working under this Agreement need work under any conditions which may be or tend to be detrimental to his health, safety, morals or reputation, *or cross any picket line or enter any premises at which there is a picket line authorized by the Council; or any other Building & Construction Trades Council or authorized by any Central Labor Council, or handle, transport or work upon or with any product declared unfair by any of such Councils.* The Employer, Developer and/or Owner-Builder agrees that he will not assign or require any employee covered by this Agreement *to perform any work or enter premises under any of the circumstances above described* and

will conform to all health and safety regulations
the State of Oregon." (emphasis supplied)

The question to be decided is whether the Boar
correctly held that Article IX is prohibited by § 8(e)
LMRA, as amended, because it authorizes prohibite
secondary activity, and that respondent's picketing
secure such agreement was an unfair labor practic
under § 8(b)(4)(i), (ii) (A) of LMRA.

APPLICABLE STATUTORY PROVISIONS

Section 8(e) of LMRA provides:

"It shall be an unfair labor practice for any labo
organization and any employer to enter into an
contract or agreement, express or implied, whereb
such employer ceases or refrains or agrees to ceas
or refrain from handling, using, selling, transportin
or otherwise dealing in any of the products of an
other employer, or to cease doing business with an
other person, and any contract or agreement entere
into heretofore or hereafter containing such a
agreement shall be to such extent unenforcible an
void: *Provided*, That nothing in this subsection sha
apply to an agreement between a labor organizatio
and an employer in the construction industry re
lating to the contracting or subcontracting of wor
to be done at the site of the construction, alteratior
painting, or repair of a building, structure, or othe
work: * * *"

Section 8(b)(4)(i), (ii)(A) of LMRA provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents —

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

* * * * *

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this sub-chapter: * * *"

ARGUMENT

I.

The Board's position is unequivocal. In *Cement Ma-*
ns Local Union No. 97, AFL-CIO (Interstate Employ-

ers, Inc., et al), (1964) 149 NLRB No. 111, 57 LRRM 14
at 1473 it held that picket line and unfair goods claus
identical with Article IX are not within the constructi
industry proviso and are forbidden by § 8(e), and th
picketing to secure them is an unfair labor practice u
der § 8(b)(4)(i), (ii)(A):

> "We also find that paragraph H * * * insofar
> they provide in substance that no employee ne
> cross a picket line which is authorized by the Buil
> ing and Construction Trades Council, are violati
> of Section 8(e) since the clause in its broad sco
> can be read as applying to unlawful secondary pic
> eting. We also find that the remaining portions
> these paragraphs which provide that an employ
> need not handle goods which have been declar
> 'unfair' by one of three named Councils is but a
> other sanction made available to the Respondent
> enforce the unlawful clauses of its agreements."

Interstate Employers was followed in *Los Angel*
Building & Construction Trades Council (Portofino M
rina), (1965) 150 NLRB No. 152, 58 LRRM 1315
1317. Those two cases announced the Board's consi
ered conclusion that such clauses, which include t
very archtype of hot cargo agreements at which § 8(
was directed, are secondary on their face and in the
purpose and effect; and to allow them on the theo
that they are within the construction industry provi
would sanction a device to extend the proviso beyo
contracting or subcontracting of work to be done at t

nstruction site, contrary to the congressional purpose. ıe Board's position has been repeated in an impressive, ıphatic and consistent line of decisions, all of which e necessarily questioned by respondent in this case.

Los Angeles Building and Construction Trades Council (Couch Electric Company, Inc. et al), (1965) 151 NLRB No. 46, 58 LRRM 1440

Drivers, Salesmen (etc.) Local Union No. 695 (etc.) (Madison Employers' Council), (1965) 152 NLRB No. 55, 59 LRRM 1131

Teamsters, Chauffeurs, (etc.) Local No. 386 (etc.) and California Association of Employers, (1965) 152 NLRB No. 83, 59 LRRM 1223

Los Angeles Building & Construction Trades Council, et al and Quality Builders, Inc., (1965) 153 NLRB No. 38, 59 LRRM 1364

Los Angeles Building and Construction Trades Council et al (Elmer E. Willhoite), (1965) 154 NLRB No. 55, 60 LRRM 1053

Bay Counties District Council of Carpenters, AFL-CIO, et al, and Jones and Jones, Inc. et al, (1965) 154 NLRB No. 120, 60 LRRM 1190

Local 300, Hod Carriers' and Construction Laborers' Union, etc. and Jones & Jones, Inc., (1965) 154 NLRB No. 142, 60 LRRM 1194

II.

The courts have consistently endorsed the Board's nclusion that both unfair goods and picket line clauses

which are not limited to lawful primary activity violat
§ 8(e).

> "* * * 'Hot cargo' agreements in any form a
> prohibited by section 8(e). * * *" *N.L.R.B. v. Inte
> *national Bro. of Teamsters, etc., Local 294*, (CA
> 1965) 342 F2d 18 at 21

An "*unfair goods*" clause was struck down by this Cou
in *N.L.R.B. v. Joint Council of Teamsters No. 38*, (CA
1964) 338 F2d 23 at 31, in the following terms:

> "Article 34 provides that respondent employe
> shall not order an employee to handle the produc
> of, or serve, an employer who is engaged in a strik
> or lockout recognized by respondent unions, n
> discipline or discharge an employee who refuses t
> do so.
>
> Article 34 is tantamount to an agreement tha
> the employers will not deal with the struck plan
> Indeed, the 'hot cargo' clause at which section 8(e
> was primarily aimed usually took this form. Th
> Board properly held article 34 invalid. * * *"

See also *Employing Lithographers of Greater Miami*
N.L.R.B., (CA 5 1962) 301 F2d 20 at 30:

> "* * * It cannot now be doubted that Congre
> has banned agreements whereby an employer r
> frains or agrees, expressly or impliedly, to refrai
> from handling the work of another employer, * * *

It has been held that an "unfair goods" clause extending only to work performed as an "ally" of a struck employer does not violate § 8(e). *N.L.R.B. v. Amalgamated Lithographers of America (Ind.)*, (CA 9 1962) 309 F2d 31 at 38; cf *Employing Lithographers of Greater Miami v. N.L.R.B.*, supra, (CA 5 1962) 301 F2d 20 at 28-29. However, if such a clause is, as here, not so limited in its scope of operation ("any product"), it is illegal, because it authorizes illegal secondary activity.

"We have held that neither the struck work clause nor the chain shop clause is unlawful. In validating the struck work clause, however, we have construed it as applying only with regard to struck work which is not customarily handled by the primary employer. But this termination clause is not so limited. It applies with regard to 'any' work received from or destined for any employer involved in a strike or lockout of the kind referred to in section 23 of the proposed agreement, whether such work was 'customary' or 'farmed out' work.

Since it is unlawful under section 8(e) for an employer to agree that he will refuse to handle work of another employer which he customarily handles, this termination clause is unlawful. The Board did not err in so finding and concluding." *N.L.R.B. v. Amalgamated Lithographers of America (Ind.)*, supra, (CA 9 1962) 309 F2d 31 at 41-42

"We agree with the Board that to the extent clause (a) protects refusals to work beyond the scope of the ally doctrine, it authorizes a secondary boycott, and so is *pro tanto* void under § 8(e) of the Labor Act. * * *" *Truck Drivers Union Local No.*

413, etc. v. N.L.R.B., (CA DC 1964) 334 F2d 539 ;
547, cert den (1964) 379 US 916

In *Truck Drivers Local 413*, the Court sustained th
Board's holding that a *picket line* clause in unrestricte
terms violated § 8(e). As in this case, the clause pr
vided that an employee could refuse to cross "any
picket line. The Court held that while a limited claus
authorizing refusals to cross primary picket lines woul
be lawful, the clause in question authorized recognitio
of secondary picket lines and was *pro tanto* illegal ar
void.

> "* * * To the extent that the clause would pr
> tect such a refusal to cross [a picket line which "
> itself in promotion of a *secondary* strike or boycott"
> it would then be authorizing a secondary strike, an
> would *pro tanto* be void under § 8(e) of the Ac
> * * *" *Truck Drivers Union Local No. 413, etc.*
> *N.L.R.B.*, supra, (CA DC 1964) 334 F2d 539 at 54
> cert den (1964) 379 US 916*

III.

The construction industry proviso of § 8(e) is n
applicable to either unfair goods clauses or picket lin
clauses whose scope of operation is unlimited. In a

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*In *Cement Masons Local Union* and *Madison Employers' Council*, supra, t
Board cited *Local No. 413* in support of its view that "a broad picket li
clause is violative of Section 8(e) to the extent that it applies to seconda
picket lines."

rming the Board's determination that an "unfair oods" clause violated § 8(e), the Second Circuit said:

"Nor is the union insulated from the effect of section 8(b)(4)(ii)(A) by the 'construction industry' proviso to section 8(e). Since the proviso is limited to 'work done at the site of the construction,' it does not sanction a 'boycott against suppliers who do not work on the job site.' * * * [T]he legislative history indicates that the proviso was not intended to protect agreements relating to supplies transported to and delivered on the construction site. 1 Leg. Hist. 943 (1959). * * *" *N.L.R.B. v. International Bro. of Teamsters, etc., Local 294*, supra, (CA 2 1965) 342 F2d 18 at 21-22

Nor is the picket line clause in a different position nder the proviso. It is neither a clause "relating to the ntracting or subcontracting of work", nor limited to vork * * * done at the site of the construction." It lates to crossing picket lines both at the construction e and elsewhere, and consequently is not within the oviso. *Truck Drivers Union Local No. 413, etc. v. L.R.B.*, supra, (CA DC 1964) 334 F2d 539 at 542-545, rt den (1964) 379 US 916.

CONCLUSION

This is not the case of a subcontract clause which designed to protect the jobs of members of the unit. n their face, these clauses authorize secondary activity hich violates § 8(e), and it is the terms of the contract

which control its validity under the statute. *Truck Dri ers Union Local No. 413, etc. v. N.L.R.B.*, supra, (CA D 1964) 334 F2d 539 at 542, cert den (1964) 379 US 91 In drafting collective bargaining agreements under th act of Congress, parties must not

> "* * * manufacture a device for rendering i enactments virtually ineffective. * * *" Sweigert, in *Brown v. Local No. 17, Amalgamated Lithogr phers*, (DC ND Cal 1960) 180 F Supp 294 at 304

Respondent picketed for a contract authorizing legal secondary activities. That picketing unquestio ably violated § 8(b)(4)(i), (ii)(A). The Board's ord should be enforced.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of e foregoing brief, I have examined Rules 18 and 19 the United States Court of Appeals for the Ninth Cir- it, and that, in my opinion, the foregoing brief is in ll compliance with those rules.

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Attorney